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## 12. The Future of Poland's Second Chamber: Is the Senate Still Needed?

**Katarzyna Granat\***

### **1 Introduction**

Since 2015, the Polish state has been at odds with the rule of law. The constitutional crisis that erupted in the autumn of 2015 concerns several issues, including the composition and the functioning of the Constitutional Tribunal, Poland's constitutional court, with the latter bearing responsibility for review of laws for their compatibility with the Polish Constitution of 1997.

On 25 October 2015, the Law and Justice party won the parliamentary elections. However, shortly before the elections, the coalition of the Civic Platform and the Polish People's Party selected five new members of the Constitutional Tribunal. Three of these seats would become vacant on 6 November 2015 while the remaining two would only become vacant on 8 December that year, thus after the new parliament would be established (12 November 2015). The incoming Law and Justice party disregarded these appointments and selected its own five candidates for the Constitutional Tribunal vacancies, and all five were sworn in by the country's Law and Justice affiliated President. Then in December 2015, the Constitutional Tribunal adjudged that the election of the two judges by the Civic Platform for the positions that would only become available in December was not compatible with the Constitution, as they were chosen by an unauthorized organ.<sup>1</sup> The Tribunal did, however, confirm the appointment of the three judges nominated for the seats vacant in November.

As of September 2018, the issue of Tribunal's membership remains unresolved. Three judges elected by the Civic Platform coalition are still waiting to be sworn in by the President. In the meantime, the position and impact of the Constitutional Court in exercising its judicial power, including its role in guaranteeing the freedom and rights of the citizens, has been diminished. In part, this has been reflected in a 42 per cent decrease in the number of cases received by the Constitutional Court in 2016.<sup>2</sup>

This disarray is only one aspect of the constitutional crisis in Poland, yet it illustrates the potential for problems arising from the fact that only the lower chamber of the parliament – the Sejm – plays a role in the selection of the judges of the Constitutional Tribunal. The process turned disorderly in the scope of a single election. It is worth asking whether some aspects of the crisis could have been avoided by more balance in Poland's bicameral structure, for example if some functions had been granted to the upper chamber of the parliament – the Senate (in Polish: *Senat*). The imbalance of powers between the chambers in this case shows that such a bicameral structure can have far-reaching consequences for the functioning of the constitutional system within the state and even outside its borders.

This chapter deals with the role of the Senate in the Polish constitutional system and the proposals concerning its role that are currently being discussed. The chapter analyses and critically assesses specific reform proposals that have been put forward by constitutional

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<sup>1</sup> Constitutional Tribunal, Judgment of 3 December 2015, K 34/15, 6.17.

<sup>2</sup> Trybunał Konstytucyjny, Informacja o istotnych problemach wynikających z działalności i orzecznictwa Trybunału Konstytucyjnego, Warszawa 2017, 69.

scholars in recent years. It advocates maintaining a bicameral structure for the Polish parliament as a whole, consisting of the Sejm and the Senate. However, some possible reforms affecting the composition, the electoral term and the functions of the Senate are assessed and discussed.

This chapter is structured as follows. First, it presents the symbolic value of the Senate in Polish constitutionalism. Second, it describes the current position and function of the Senate. Third, the chapter analyses the flaws of the Polish bicameral system. Fourth, the chapter presents an overview of the reforms currently being considered and contributes to this discussion by critically assessing their value as well as by offering insights from other bicameral systems. Finally, the chapter examines conditions for constitutional amendment and vested interests of other institutions as potential obstacles to a reform of the Senate.

### 1. Symbolic value of the Bicameral System

Bicameralism plays an important role in Poland from a historical perspective. The Senate is seen as a symbol of the independent state as well as of some sentimental value. The first Polish Constitution of 3 May 1791 established a legislative branch consisting of the Chamber of Deputies (Sejm) and the Senate. The Senate at the time was an unelected chamber of bishops, palatines, castellans (regional administrators), and ministers, under the presidency of the King.<sup>3</sup> Within the legislative power the focus was on the Sejm, which underwent major reforms in the 1791 Constitution. The unanimity rule was abandoned in favour of majority voting, and the Sejm was granted the competence to tax the nobility and the clergy. Any bill enacted by the Sejm would be forwarded for the approval of the Senate. The Senate by majority decision could either approve it or suspend a bill until the next Sejm, which could then overturn the suspension and approve the law in question. Thus, the Senate could only delay a law approved by the Sejm. The Constitution of 3 May 1791 was in force only until 1795 when Poland lost its independence for 123 years.

After Poland regained its independence after World War I, in 1921, the March Constitution re-introduced the Senate as a second, now directly elected, upper chamber. In contrast, under the subsequent April Constitution of 1935, the President instead nominated one-third of the senators and the remaining two-thirds were chosen indirectly by state elites holding certain positions in regional government, education or the military. The Senate had no right to initiate legislation under either the March or the April Constitutions. Still, the April Constitution granted the Senate the role of ‘the second parliamentary chamber’ with competence to discuss the state budget and acts adopted by the Sejm, as well as decisions on the political accountability of the government.<sup>4</sup>

After World War II, the Senate was abolished and reinstituted only subsequent to the revision of the Constitution of the Polish People’s Republic after the Roundtable Talks of 1989. On 4 June 1989, for the first time since 1947, partially free elections took place in Poland. The ‘partially free’ form meant that 65 percent of the seats in the Sejm elections (460 seats in total) would be freely elected by the people, while the remaining 35 percent were reserved for the

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<sup>3</sup> Art VI of Constitution of 3 May 1791.

<sup>4</sup> Art 46(1) of the April Constitution.

representatives of the Communist party. In contrast, the elections for the Senate (100 seats) were fully free. The result was overwhelming: civic committees created by the 'Solidarity' movement gained all the available seats in the Sejm as well as 99 of the 100 seats in the Senate. The Senate has since been directly democratically elected, both under the Small Constitution of 1992 and under the current Constitution of 1997.

Throughout Polish history, the Senate has played an important role, becoming a symbol of a free and independent Poland. Today's Senate remains anchored in these ideas and thus far there was only one reform of the chamber, concerning the new election procedure via single member constituencies. At the same time, the Polish Senate is an outlier within the post-Communist bloc when it comes to the bicameral structure of the parliament: amongst the other post-Communist states, only the Czech Republic has introduced a two chamber system. The Czech Senate was established following the tradition of the First Republic (1918-1938), which had a parliament (National Council) consisting of the Chamber of Deputies and the Senate, as well as following the federal organisation of the now broken up Czechoslovakia.<sup>5</sup> In comparison, other post-Communist states have adopted a unicameral structure of parliament. For example, unicameralism has constantly been present in the history of the Hungarian parliament and as such was also maintained after 1989.

## **2 Current structure of Polish bicameralism**

The elections to both the Sejm and the Senate are universal, direct and secret. However, they differ with regard to the applicable voting mechanisms. The deputies of the Sejm are elected via an equal and proportional system. The members of the Senate are elected in single member constituencies with majority voting.<sup>6</sup> This first past the post system replaced a system of proportional allocation of seats, in which seats were allocated by plurality block voting, with voters having one vote for each available seat in their district. Both chambers are elected at the same time for a four-year term and the term of the Senate is bound to that of the Sejm, which means that if there is a shortening of the Sejm's term with new elections, this implies the same for the Senate.

The function of the Senate is rather limited in all relevant processes of government, in the legislative function, the elective function and in the scrutiny of the government. The Sejm plays the main role in the legislative procedure, as according to the Constitution, it is the chamber that adopts statutes.<sup>7</sup> The Senate can introduce legislative proposals and propose amendments to any legislative act passed by the Sejm. However, it does not have rights equal to those of the Sejm. Although the Senate can reject a legislative act that has passed through the Sejm, this is only a suspensory veto, since the Sejm can overturn it by an absolute majority of votes in the presence of at least half of the statutory number of its members.<sup>8</sup> The Senate also takes part in the budgetary proceedings. It can introduce amendments to a proposal by the Sejm, but cannot

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<sup>5</sup> Lukáš Linek, Zdenka Mansfeldová, 'The Parliament of the Czech Republic, 1993–2004' (2007) 13 *The Journal of Legislative Studies* 12, 13.

<sup>6</sup> Act of 5 January 2011, Electoral Code.

<sup>7</sup> Art 120 of the Constitution.

<sup>8</sup> Art 121(3) of the Constitution.

reject the budgetary act outright.<sup>9</sup> Both the Sejm and the Senate grant approval for the ratification of any international treaty that confers powers of state organs to an international organisation (e.g. the Lisbon Treaty). Similarly, within the constitutional amendment procedure, each chamber can introduce proposals for constitutional amendments and both must grant approval of any such amendments.<sup>10</sup>

The Senate also has an elective function and grants consent to the appointment by the Sejm of the President of the Supreme Chamber of Control, and the Ombudsperson. Furthermore, the Senate appoints one member to the National Council of Broadcasting and Television.<sup>11</sup> However, only the Sejm can select the President of the National Central Bank and, as indicated above, the members of the Constitutional Tribunal.<sup>12</sup>

Finally, the Senate does not exercise any control function over the government. This power is reserved for the Sejm: the government and its individual members are politically accountable to the Sejm only.<sup>13</sup> Moreover, the Sejm can decide to hold the members of the government accountable before the Tribunal of State for a breach of the Constitution or a statute.<sup>14</sup>

In sum, the powers of the Senate are rather limited vis-à-vis the Sejm and thus Polish bicameralism can be classified as an example of relatively weak bicameralism, with asymmetrical and congruent chambers according to the categories established by Lijphart.<sup>15</sup> Specifically, the asymmetrical structure is evident in the lack of equal powers of the chambers, in particular the absence of a possibility for the Senate to veto bills coming from the Sejm, and the lack of power to hold the government accountable. The chambers are congruent due to the very similar composition (party balance) of the chambers resulting from synchronized elections, despite the different electoral methods applicable.

### **3 The Flaws of Polish Bicameralism**

The adoption of a bicameral structure of government is often motivated by the possibility to create an additional forum that can consult a different social group to improve the authority of the government and gain guidance from another source, often one with more experience or with an otherwise distinctive feature.<sup>16</sup> A bicameral structure can be also justified by reference to the federal state, as the case in the US and in some European countries (in particular, Germany and Switzerland), where the views of the federated states are represented in the second chamber.<sup>17</sup>

Against this background, Polish bicameralism seems unjustified. First, the Sejm and the Senate are congruent in terms of membership. The elections to both chambers take place at the same time, and as a result do not significantly differ in any important respect in terms of the aspects

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<sup>9</sup> Art 223 of the Constitution.

<sup>10</sup> Arts 90(2) and 235 of the Constitution.

<sup>11</sup> Arts 205(1), 209(1) and 214(1) of the Constitution.

<sup>12</sup> Arts 227(3) and 194(1) of the Constitution.

<sup>13</sup> Art 157 of the Constitution.

<sup>14</sup> Art 156(2) of the Constitution.

<sup>15</sup> See Arend Lijphart, *Patterns of Democracy: Government Forms & Performance in Thirty-six Countries*, Second Edition (New Haven, Yale University Press, 2012) 192 ff.

<sup>16</sup> Donald Shell, 'The History of Bicameralism' (2001) 7 *The Journal of Legislative Studies* 5, 6.

<sup>17</sup> *ibid*, 12.

of public opinion they reflect. In general, the different electoral systems put in place for the chambers – proportional in the Sejm and majoritarian in the Senate – could be expected to offer some diversity. However, in the two elections since the electoral reform of 2011, namely in 2011 and 2015, the winning major parties, either the Civic Platform or the Law and Justice party, controlled the Senate in the same way as they controlled the Sejm. In consequence, instead of a more pluralist composition of the Senate due to the majoritarian system in place, the political dynamics tend to mirror those of the Sejm. Second, the Senate's composition does not reflect any type of regional division of the state or specific regional interests because Poland is a unitary state. The senators, similarly to the deputies, represent the Nation, rather than a region.<sup>18</sup>

In addition to this classic justification of bicameralism, there are several plausible benefits of a second chamber in practice: providing 'a more independent view' because of a less party-dominated environment; acting as 'veto players' in the policy-making process; or complementing the work of the lower chamber.<sup>19</sup> In its current shape, the Senate delivers very little in this respect. First, the strong party discipline in the Senate diminishes the potential to act as an independent institution. Moreover, since it is possible to hold both the office of governmental minister and a seat as a senator simultaneously, the executive and the legislative are not rigorously divided.<sup>20</sup> Different terms of office for each chamber, as is the case for the Senate of the Czech Republic could bring about some independence of the Senate.<sup>21</sup> Yet, in Poland, the terms of office of the Sejm and the Senate are bound together; starting and ending at the same time and no possibility of a partial renewal is foreseen. Such a design of parliamentary terms leads to the domination of the chambers by the same political powers.

Second, there is little evidence of the Senate acting as an effective 'veto player'. The Senate is competent to, within 30 days of submission of a bill passed by the Sejm, adopt that bill without amendment, adopt amendments, or reject it outright.<sup>22</sup> The practice of recent Senate terms indicates that the chamber hardly ever rejects a bill and instead favours amending it. For instance, in the Senate's fifth term (2001-2005), of 899 bills adopted by the Sejm, the Senate opted for the rejection of only six bills, proposed amendments to 495 and adopted 398 bills without amendment.<sup>23</sup> The Sejm responded by adopting a large share (83.1 per cent) of the Senate's proposed amendments and followed the Senate's resolution for total rejection of a bill in only one case. The share of Senate amendments approved by the Sejm in the following two terms (2005-2007 and 2007-2011) remained at a similar level of 81.8 per cent and 86 per cent, respectively. This was accompanied by a very low number of rejections of bills by the Senate (four in each term).<sup>24</sup> Although in consequence, one might observe that the Senate critically reviews bills forwarded by the Sejm, the value of such control appears limited due to the fact

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<sup>18</sup> Art 4(2) of the Constitution.

<sup>19</sup> Meg Russell, 'What are Second Chambers for?' (2001) 54 *Parliamentary Affairs* 442, 443.

<sup>20</sup> Art 103 and 108 of the Constitution.

<sup>21</sup> Russell (n 19) at 448.

<sup>22</sup> Art 121(2) of the Constitution.

<sup>23</sup> See at <http://ww2.senat.pl/k5/pos/inf.HTM>.

<sup>24</sup> See data for the VI term at <http://ww2.senat.pl/k6/pos/inf.htm> and for VII term at <http://ww2.senat.pl/k7/pos/inf.pdf>.

that the amendments rarely deal with the merits of the act at stake and instead tend to focus on rather minor editorial issues.<sup>25</sup> However, even if the relevance of the amendments is low, the fact that the Senate proposes amendments for almost half of the total number of bills each term suggests to some that the Senate helps to limit the need for their review by the Constitutional Tribunal at a later stage.<sup>26</sup>

Third, although the Senate largely does not provide an independent view, and although its role as a ‘veto player’ is rather limited, the Senate arguably complements the work of the Sejm in two respects. First, the Senate makes use of its power to initiate legislation. In particular, it often puts forward proposals for legislation that executes the judgments of the Constitutional Tribunal. In practice, acts implementing such judgments constitute a large share of the legislative proposals introduced by the Senate.<sup>27</sup> Yet, post-2015, this function of the Senate has lost its importance as the Constitutional Tribunal has issued fewer judgments. The other function is the Senate’s engagement in maintaining contacts with Polish citizens living abroad. This responsibility as ‘guardian’ of the Polish diaspora (so-called ‘Polonia’) is linked, again, to the symbolic position of the Senate as the state organ that was re-introduced and fully freely elected after the fall of Communism. In this role, the Senate promotes Polish culture and national heritage from its own budget. These two functions of the Senate highlight its capability of sharing parliamentary responsibilities with the Sejm.

#### 4 Reforms under Discussion

In each parliamentary election, at least one political party runs on a program that argues for the abolition of the Senate. However, in fact, except for the absence of federalism, none of the factors that studies of parliamentarism correlate with unicameralism is present in Poland.<sup>28</sup> Unicameralism is linked to small populations and small countries, often paradoxically, with unstable democracies.<sup>29</sup> In the absence of these elements, is convincing it that one should look for ways to reform Polish bicameralism rather than abandoning it outright.

In some areas, the Senate’s role has already been reformed and in consequence improved, for example with regard to the control of the government when taking decisions at the EU level. Under the first Act of Cooperation of 2004, introduced just days prior to Poland’s accession to the EU, the government was not obliged to request opinion of the Senate on the position that the government was planning to take at the Council of the EU meeting.<sup>30</sup> Only the Sejm could

<sup>25</sup> Krzysztof Skotnicki, ‘Senat III RP – nieprzemyślany czy niepotrzebny?’, in Marek Zubik (ed), *Dwadzieścia lat transformacji ustrojowej w Polsce* (Warszawa, Wydawnictwo Sejmowe, 2010) 225ff.

<sup>26</sup> Bogusław Banaszak, ‘Przesłanki istnienia Senatu w Polsce’ in Andrzej Bisztyga, Piotr Zientarski (eds) *Kierunki zmian pozycji ustrojowej i funkcji Senatu RP* (Warszawa, Kancelaria Senatu, 2014) 20.

<sup>27</sup> In VII term (2007-2011) 77 out of 124 projects of Senate’s statutes concerned execution of the judgments of the Constitutional Tribunal. See <http://ww2.senat.pl/k7/pos/data/008.pdf>. See also the data collected by the Tribunal at <http://orka.sejm.gov.pl/Druki7ka.nsf/0/507BA1F905AF504DC1257E290025A17C/%24File/3328.pdf> (54-57).

<sup>28</sup> On the justifications for creation of upper chambers see Chapter by Romaniello in this volume.

<sup>29</sup> Louis Massicotte, ‘Legislative Unicameralism: A Global Survey and a Few Case Studies’ (2001) 7 *The Journal of Legislative Studies* 151, 152.

<sup>30</sup> Art 9 of the Act of 11 March 2004 on Cooperation of the Council of Ministers with the Sejm and the Senate on matters related to Poland’s membership in the European Union.

provide such an opinion. The Constitutional Tribunal declared this arrangement unconstitutional, since in reviewing the government's position on EU draft legislation, the Senate was simply exercising its legislative function, and not extending its powers into a control function over the government. As a consequence, the Tribunal found that both chambers should be 'guaranteed equal participation in activities concerning the shaping of Poland's position in the field of adopting EU law'.<sup>31</sup> Currently, the Act of Cooperation of 2010 guarantees both the Sejm *and* the Senate the right to express opinion on the positions of the Polish government taken in the Council of the EU or the European Council. The government must submit in writing information about its negotiating position on draft EU acts before a meeting of the Council of the EU or the European Council, in order to obtain the opinion of the European Affairs Committee of each chamber.<sup>32</sup> The obligation to consult each chamber can in some cases be waived.<sup>33</sup> Nonetheless, some inequality between the chambers remains, since only the Sejm's opinion, if issued, becomes the basis of the government's negotiating position.<sup>34</sup>

Beyond the reform connected to Poland's membership of the EU, there exists a wider debate concerning whether to abolish the Senate or reform it in other areas. The discussion on reforms concerns first the functions of the Senate and second, the method of election of the chamber and its term.

#### **4.1 Functions of the Senate**

##### *Legislative function*

First, one of the most discussed reforms concerns the strengthening of the legislative function of the chamber. As was mentioned above, the Constitution foresees that 'the Sejm adopts statutes' and the Senate can only respond, and either accept them as they are, introduce an amendment or reject the statute, which can, however, be overturned by the Sejm. Since the Senate works with an already adopted act, the scope of amendments is limited.<sup>35</sup>

One possible proposal to address this issue targets the majority with which the Sejm can override the Senate's rejection of a statute or proposed amendments. Under the proposal, the current qualified majority requirement should be replaced by a three-fifths majority, making it harder for the Sejm's deputies to automatically reject the amendments of the Senate or the total

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<sup>31</sup> See Constitutional Tribunal, K 24/04, judgment of 12 January 2005, para III 11; Anna Pudło, 'A New Role of the Polish Senat's EU Affairs Committee in European Integration' (2010) 16 *European Public Law* 223, 227.

<sup>32</sup> Art 11(1) and 12 (1) and (2) of the Act of 8 October 2011 on Cooperation of the Council of Ministers with the Sejm and the Senate on matters related to Poland's membership in the European Union (Act on Cooperation of 2010).

<sup>33</sup> See Art 11 (3) and 12(3) of the Act on Cooperation of 2010.

<sup>34</sup> Art 13(1) of the Act on Cooperation of 2010. However, if the government adopts a position that does not take into account the opinion of the Sejm, the only consequence is that the government is obliged to give an explanation to that chamber. See Art 13(2) of the Act on Cooperation of 2010. See also Maciej Serowanec, *Parlamentarne Komisje do Spraw Europejskich* (PhD thesis, Toruń, 2015) 178-79.

<sup>35</sup> Marek Dobrowolski, 'W sprawie potrzeby reformy dwuizbowości polskiego parlamentu' (2009) 91 *Przegląd Sejmowy* 31, 41.



rejection of the statute.<sup>36</sup> The need to assemble a bigger majority in the Sejm would tend to require convincing members of other parties to join the majority and enable more broad-based discussion of legislation.

Even though it addresses one aspect of the asymmetry between the Sejm and the Senate, this proposal poses certain problems. First, it is unclear whether it would be effective at all if the congruence of both chambers in Poland is not addressed simultaneously. As mentioned above, the political party that controls the Sejm also tends to control the Senate, and as such, the Senate rarely presents an independent view on any given legislation. Second, requiring supermajorities to override a veto may lead to paralysis of the legislative process if the veto is too easy to cast and too hard to override. This was one of the motives behind the ultimately unsuccessful reform efforts in Italy, where a proposal for public referendum, aimed at limiting the power of the second chamber to delay legislation and streamline the political process.<sup>37</sup> Related discussions have also been taking place in the UK, where the extent to which the House of Lords can block secondary legislation (though not primary legislation known as bills) passed in the House of Commons has been discussed by the Strathclyde report.<sup>38</sup> The Italian and the British examples illustrate the difficulty in calibrating the balance between two chambers in the legislative process.

### *Control Function*

Beyond the reforms within the legislative procedure already put forward in the debate, the Senate should arguably gain powers within the control of the government. As of now, the Senate has no power to hold the government accountable. Senators can only pose a question to a member of the government present at the sitting of the Senate concerning an issue under discussion that falls in the scope of the department of that minister.<sup>39</sup> The minister can, if the senator agrees, also answer in writing. This right could potentially be developed into a form of control, similar to that available to the Sejm. The Senate could be hence endowed with the possibility to address questions to ministers concerning specific aspects of the government's (current) policy or address, in writing, an interpellation regarding more fundamental issues. Ministers might be also requested to present information on issues of current and vital political interest at the plenary session of the Senate. A final way to give more oversight to the Senate would be the possibility to establish a parliamentary inquiry committee to investigate a member of the government or its administration in a specific case with the aim of holding that person accountable before the Tribunal of State.

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<sup>36</sup> Bartłomiej Opaliński, 'Uwagi o potrzebie modyfikacji drugiej izby parlamentu we współczesnym polskim systemie ustrojowym' [2012] *Przegląd Prawa Konstytucyjnego* 77, 89.

<sup>37</sup> Currently a bill becomes law only after it has been passed by both Houses of Parliament in the same wording. See Art 72 of the Italian Constitution.

<sup>38</sup> Strathclyde Review: Secondary legislation and the primacy of the House of Commons, December 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/486790/53088\\_Cm\\_9177\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486790/53088_Cm_9177_Web_Accessible.pdf).

<sup>39</sup> Art 44(6) of the Senate Rules of Procedure.

An important question to keep in mind, however, is whether a second chamber would have the legitimacy to control an elected government. For example, if the Senate were indirectly elected, it might arguably lack the legitimacy to hold the executive that derives from the directly elected Sejm accountable. For instance, the reform of the Italian bicameralism proposed under the ultimately unsuccessful referendum of 2016 involved a change from direct to indirect elections to the Senate and a parallel removal of its power to trigger vote of confidence in the government.<sup>40</sup>

### *Elective function*

Finally, one may consider the involvement of the Senate in the selection process for members of the Constitutional Tribunal and the Tribunal of State, both of which are currently elected by the Sejm alone.<sup>41</sup> The control of the executive, together with the Senate's impact on the judiciary via the selection procedure, would strengthen the principle of separation and balance of power expressed in Article 10 of the Constitution. In particular, involvement of the Senate could reduce situations of conflict between the executive and judiciary such as the current crisis concerning the Constitutional Tribunal described in the introduction. Specifically, the Senate (especially if presenting a different political view than that of the Sejm) could, with its new tools, keep the government in check, and at the same time, influence the composition of the Tribunal by offering its own candidates.

## **4.2 Method of election and term of the chamber**

### *Indirect elections*

Second, regarding the reform of the method of election, one proposal in the academic debate suggests that senators should be elected indirectly, by the elected members of local governments, selecting from candidates not within their own group.<sup>42</sup> In addition, this proposal suggests that a share of members of the chamber would consist of persons who previously served as President, President of Supreme Chamber of Control or judges of the Constitutional Tribunal, thereby infusing the Senate with significant experience. Moreover, former Sejm deputies who served for four or five parliamentary terms could become senators for one term. In sum, this proposal targets the congruence of Senate and Sejm and aims to create some political differentiation between the parliamentary chambers.<sup>43</sup>

However, this proposal has two drawbacks. First, it would surrender some of the legitimacy of the senators arising from their being directly elected (discussed below). Second, including ex-Presidents and other public figures would not add much diversity to the chamber and might be perceived simply as an idea of 'doing something' with such dignitaries.

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<sup>40</sup> Bernardo Giorgio Mattarella, 'The Ongoing Constitutional and Administrative Reforms in Italy', Report for the XVII German-Italian Colloquium on Public Law, Augsburg, March, 10-12, 2016, 2.

<sup>41</sup> Art 194(1) and 199(1) of the Constitution.

<sup>42</sup> Dobrowolski (n 35) at 51.

<sup>43</sup> *ibid*, 52ff.

The proposals discussed above maintain to a large extent the political character of the Senate, rather than introducing an expert one. The latter could partially be provided by an Irish-styled Senate.<sup>44</sup> In Seanad Éireann, a majority of senators represent vocational interests (Culture and Education, Agriculture, Labour, Industry and Commerce and Public Administration), certain senators are elected by the graduates of two universities (National University of Ireland and the University of Dublin), and the remainder are nominated by the Taoiseach (prime minister). Such compositional distinctiveness could differentiate the chambers in Poland by introducing representatives of vocational interests into the Senate. Nonetheless, such a reform could link the Senate of a free Poland with the designs of real socialism of Communist times, when the unicameral Sejm was assisted by a Socio-Economic Committee, which consisted of 150 representatives of state enterprises, trade unions, unions of individual farmers, artisans, scientists and Catholic groups. Moreover, if some senators were elected by universities, taking into account the large number of universities in Poland, and their diverse quality, it would be impossible to decide which universities should select senators. Hence, at least for these two reasons the idea of representation of select groups in the Senate should also be rejected.

### *Direct elections and the inclusion of the representatives of 'Polonia'*

The perceived legitimacy aspect of second chambers has been seen as an additional dimension of the strength of second chambers next to their formal powers and membership incongruence.<sup>45</sup> In this light, a directly elected Senate should be maintained.

Certain proposals have emerged in the debate to introduce a level of representation for 'Polonia' – Polish citizens living abroad – to the Senate. Currently, Polish citizens abroad can vote in the parliamentary and presidential elections, as well as the elections to the European Parliament in the electoral committees abroad, but their vote is absorbed by the Warsaw district.<sup>46</sup> As a consequence, 'Polonia' has no dedicated representative chosen via national elections. Current proposals for reform are not very detailed, however. For example, the executive has recently spoken of one such representative being included in the composition of the Senate.<sup>47</sup> Nonetheless, one possibility could be that 94 members of the Senate would remain directly elected while the remaining six senators would represent 'Polonia' on the six continents (excluding Antarctica). In this way, the important role that the Senate plays with regard to Poles abroad would find additional expression.

Representation of citizens living abroad is envisaged for example in France and Italy and seems to offer a successful model in this regard. In France, Article 24 of the Constitution foresees the representation of French nationals living abroad in the Sénat, and since its amendment in 2008,

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<sup>44</sup> See Chapter 9 in this volume. Alternatively, an inspiration for the Senate could be the Slovenian National Council whose members represent social, economic, professional, and local interest groups. See Chapter 13 in this volume.

<sup>45</sup> Meg Russell, 'Rethinking Bicameral Strength: A Three-Dimensional Approach' (2013) 19 *The Journal of Legislative Studies* 370.

<sup>46</sup> Art 14 of the Election Code.

<sup>47</sup> See

[http://www.msz.gov.pl/pl/aktualnosci/msz\\_w\\_mediach/dziedziczak\\_chcemy\\_by\\_polonia\\_miala\\_przedstawiciela\\_w\\_senacie\\_\\_depesza\\_pap\\_z\\_18\\_kwietnia\\_2016\\_r\\_\\_jsessionid=A121C52C7292E2C6B75E72904755240A.cmsap2p](http://www.msz.gov.pl/pl/aktualnosci/msz_w_mediach/dziedziczak_chcemy_by_polonia_miala_przedstawiciela_w_senacie__depesza_pap_z_18_kwietnia_2016_r__jsessionid=A121C52C7292E2C6B75E72904755240A.cmsap2p).

also in the Assemblée nationale.<sup>48</sup> Since the parliamentary elections in 2012 for the National Assembly, there are eleven constituencies for French citizens living abroad, each electing one deputy.<sup>49</sup> The representation in the Senate is much more established; since 1946 French citizens abroad had their own senators.<sup>50</sup> In the Sénat, twelve senators represent French nationals abroad.<sup>51</sup> Like all senators in France, they are indirectly elected. In the case at hand, it is the electoral college of the Assembly of French Citizens Abroad, consisting of 155 directly electors chosen by the French citizens living abroad registered on the electoral list.<sup>52</sup> In Italy, similarly to France, since the constitutional amendment of 2001, Italians living abroad elect 12 members of the Camera dei deputati and six members of the Senato della Repubblica.<sup>53</sup> In both cases, the representatives of Italians abroad are elected directly in one of the four overseas constituencies, with at least one deputy and one senator from each zone, and the remaining seats are divided proportionally to the number of Italian citizens living in each of the zones. However, the idea of abandoning representatives of Italians abroad in the Senato della Repubblica and instead introducing members elected indirectly by regional councils and a small number of senators to be appointed by the Italian president was entertained as part of a major, but ultimately failed, constitutional reform of 2016.<sup>54</sup>

#### *Six year term and partial renewal of the Senate*

The only way to introduce at least some political differentiation is to move Senate elections to a different point of time than those to the Sejm. Political divergence between the chambers could thus be increased, for example via the suggestion already made in the scholarly debate to prolong the term of the Senate from four to six years and to exchange one-third of its members every two years.<sup>55</sup> This solution would require a division of electoral districts into three groups, and elections would take place in a different group every two years (in case of single member constituencies) or a number of seats in each district would be elected every two years (e.g. in case of constituencies with nine seats, three seats would be elected every two years). The reformed Senate elections would take place together with those for the Sejm (twice) and with local elections (once). The proposal of partial renewal of the senators mirrors the system that has been in place in the Czech Republic since 1992. There, every two years, one third of the 81 members of the Senate are elected for six years, in one-seat constituencies according to a majoritarian system.<sup>56</sup> Every other year, the elections are conducted in one third of the constituencies.<sup>57</sup>

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<sup>48</sup> LOI constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République.

<sup>49</sup> On the composition of French Senate see Chapter by Monge in this volume. For the location of constituencies at

[http://www.diplomatie.gouv.fr/fr/IMG/pdf/Les\\_11\\_circonscriptions\\_electorales\\_pour\\_l\\_election\\_des\\_deputes\\_representant\\_les\\_Francais\\_etablis\\_hors\\_de\\_France.pdf?](http://www.diplomatie.gouv.fr/fr/IMG/pdf/Les_11_circonscriptions_electorales_pour_l_election_des_deputes_representant_les_Francais_etablis_hors_de_France.pdf?)

<sup>50</sup> See [https://www.senat.fr/role/fiche/franc\\_etrang.html](https://www.senat.fr/role/fiche/franc_etrang.html).

<sup>51</sup> See [http://www.senat.fr/role/tableau\\_repartition\\_senateurs.html](http://www.senat.fr/role/tableau_repartition_senateurs.html).

<sup>52</sup> See [https://www.senat.fr/role/fiche/franc\\_etrang.html](https://www.senat.fr/role/fiche/franc_etrang.html).

<sup>53</sup> La legge costituzionale 23 gennaio 2001, n. 1; Arts 56 and 57 of the Italian Constitution.

<sup>54</sup> Mattarella, (n 40 above) at 2.

<sup>55</sup> Dobrowolski, (n 35 above) at 50.

<sup>56</sup> Arts 16(2) and 18(2) of the Czech Constitution.

<sup>57</sup> See [http://www.senat.cz/senat/volby/jsv-eng.php?ke\\_dni=1.8.2016&O=10](http://www.senat.cz/senat/volby/jsv-eng.php?ke_dni=1.8.2016&O=10).

Decoupling the election of the Senate from that of the Sejm may ameliorate the congruency of the chambers. As such, it may lead to a better utilisation of the powers that are already in place. For example, a Senate that is controlled by a different party may elect to exercise its legislative amendment power more actively than has been the case in the past.

The drawbacks of the proposal include the resulting proliferation of elections and the effect that this might have on the ability of the government to work effectively. Furthermore, limiting the share of seats up for election may reduce the perceived importance of any given election and may invite political apathy and the potential for protest votes. Already now, electoral turnout in Poland is rather low, and adding extra election days could drag this number still further down.<sup>58</sup>

In conclusion, the reform ideas concerning the composition of the chamber oscillate around two issues: its functions and its method of election. Accordingly, the control and elective function might be open to reform. In turn, the proper exercise of the legislative function might depend on the method of election and the term of the Senate, which could possibly introduce some incongruence to the Polish bicameral system. At the same time, a directly elected Senate, with some representation of Polish citizens abroad, would maintain its high legitimacy and be also apt to exercise some form of control of the government.

## **5 Why is the Polish Senate so hard to reform?**

The Senate was created as the result of wholesale constitutional change after the Communist period. With the exception of the modification of the electoral system in 2011, no far-reaching reforms have come about since then. One of the reasons why reform of the Senate has not taken place is a lack of clarity over the ultimate purpose of the chamber.<sup>59</sup> This is especially visible in the different conceptions of the chamber analysed above, which still remain under discussion. In the end it is not really clear from the academic debate whether the Senate should be indirectly elected (e.g. consist of representatives of local self-government) but maintain limited powers or, whether it should remain directly elected and gain more competences.

In addition, there are barriers to reform. Academic commentators have pointed out various obstacles including constitutional rigidity, wider constitutional disputes such as over federalism, the vested interests of groups that benefit from the status quo and the attitude of the government.<sup>60</sup> Some of those difficulties are present in the Polish case.

The constitutional amendment procedure in Poland creates the main obstacle to reform of the bicameral system. The procedure of constitutional amendment foreseen in the Constitution provides a number of hurdles.<sup>61</sup> First, the launch of the amendment procedure requires an initiative of at least 90 deputies, the Senate, or the President. Next, a majority of at least two-thirds of votes in the presence of at least half of the statutory number of deputies and an absolute majority of votes in the presence of at least half of the statutory number of senators is needed

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<sup>58</sup> For example in 2014 the turnout in EP elections was 23,83%.

<sup>59</sup> See similar considerations for problems with the reform of senates in other countries, Meg Russell, Mark Sanford, 'Why are Second Chambers so Difficult to Reform?' (2002) 8 *The Journal of Legislative Studies* 79, 81.

<sup>60</sup> *ibid*, 83ff.

<sup>61</sup> Art 235 of the Polish Constitution.

for the approval of the statute amending the Constitution. Moreover, if the amending bill concerns Chapters I, II or XII (on constitutional principles, fundamental rights and the constitutional amendment procedure respectively) a national referendum on the amendment must take place. In fact, since its enactment in 1997, the Constitution has been amended only twice. The first amendment in 2006 lifted the prohibition on the extradition of Polish citizens under some circumstances in order to enable the operation of the European Arrest Warrant.<sup>62</sup> The second amendment, in 2009, excluded persons sentenced for imprisonment for an intentional crime from running in parliamentary elections.<sup>63</sup>

The difficulties in the reform of the Polish Senate are, to some extent, connected to vested institutional interests in maintaining a weak Senate. This is especially the case for the Sejm that currently dominates the legislative process. In addition, the attitude of the government is critical, since the executive is reluctant towards additional control being exercised through the Senate. Nonetheless, the overarching principle of the ‘common good’ expressed in Article 1 of the Constitution should guide the reform of the Senate and at the same time give a fuller expression to the principle of separation and balance of power.

In practice, in 2018, the President launched the heretofore most advanced – and ultimately unsuccessful – attempt to discuss possible changes to the Polish constitution. The nationwide referendum proposed by the President was intended to be consultative in character – without any legal effect – but its outcome could have been taken into consideration by the parliament if the latter had decided to amend the Constitution. To go through with the referendum the President requires the consent of the Senate expressed by an absolute majority of votes.<sup>64</sup> Accordingly, the President proposed 10 questions for the referendum.<sup>65</sup> They concerned possible changes in the model of government: the introduction of a presidential system or cabinet system, or maintaining the current system of the executive. Other questions asked related, for example, to constitutional regulation of Poland’s membership of the EU and NATO. Clearly, none of the questions of the attempted referendum addressed the bicameral structure or the abolition of the Senate, proving that any reform in this respect is currently not on the political agenda. Nonetheless, the Senate did not grant its consent to the nationwide referendum.<sup>66</sup> Formally, this was due to the quality of the proposed questions and problematic date of the referendum, but in fact, the refusal was most probably due to internal party divisions and a likely low turnout. As such, the Senate, dominated by the Law and Justice party, decided not to support the proposal of its own President.<sup>67</sup> In consequence, the discussion of the President’s proposals subsided.

## 6 Conclusion

This chapter discussed the light and shadow of the bicameral structure of the Polish parliament and explored the possibilities to reform its Senate. The chapter highlighted three main problems

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<sup>62</sup> Art 55 of the Constitution.

<sup>63</sup> Art 99(3) of the Constitution.

<sup>64</sup> Art 125(2) of the Constitution.

<sup>65</sup> See at [http://www.prezydent.pl/gfx/prezydent/userfiles3/files/2018\\_referendum/projekt\\_postanowienia.pdf](http://www.prezydent.pl/gfx/prezydent/userfiles3/files/2018_referendum/projekt_postanowienia.pdf).

<sup>66</sup> Senate, Wyrażenie zgody na zarządzenie przez Prezydenta Rzeczypospolitej Polskiej ogólnokrajowego referendum, Vote of 25.07.2018.

<sup>67</sup> See Prezydent kontra Prawo i Sprawiedliwość *Rzeczpospolita* (Warsaw, 25.07.2018).

in the functioning of the Senate as it is currently designed: (i) a limited position in the legislative procedure, especially in the amendment of acts approved by the Sejm, (ii) a reduced role in the election of members of state organs and (iii) no role in the oversight of the government. This analysis enabled classification of the Polish bicameralism, following Lijphart's terms, as weak with asymmetrical and congruent chambers. However, as the historic overview has shown, the Senate has been seen as an institution with a rich background and a symbol of the free and independent Polish state. Nonetheless, reform of the Senate is a topic of ongoing discussions, including a number of proposals concerning the composition, the term and the functions of the chamber have been put forward by constitutional scholars.

This paper joined this discussion and offered a critique and some comparative perspective on proposals concerning the Senate. Indeed, the inclusion of representatives of the Polish communities abroad could potentially introduce a new aspect to its composition, and also to help better fulfil its role as a link with 'Polonia'. Moreover, the chapter positively assessed the possibility of introduction of diverging start dates for the terms of the Sejm and the Senate. This reform, often put forward in the scholarship, could enable the political diversity of the chambers and limit the congruence between the Sejm and the Senate. In addition, upholding direct elections to the Senate would maintain the political legitimacy of the chamber, which in turn, is a factor in the theory of bicameral strength. The chapter has also positively assessed the introduction of additional Senate powers for the control of the government and the possibility to elect judges of the Constitutional Tribunal and members of the Tribunal of State. Such reforms would in parallel strengthen the principle of separation and balance of power by providing additional checks and balances on the executive and judiciary. In this sense, the improved role of the Senate could contribute to the proper functioning of democracy, especially in the light of the ongoing 'rule of law' crisis in Poland.

Finally, the chapter dealt with the feasibility of the reform of the Senate. In this respect, the chapter identified the high thresholds for constitutional amendment, as well as the vested interests of the Sejm and the reluctance of the government to introduce another means of oversight as potential obstacles to a reform of the Senate. In practice, however, a reform of Polish bicameralism remains in the realm of academics. The lack of any question concerning the composition and functions of the Polish upper chamber in the President's failed referendum indicates that any reform of the Senate is nowhere on the constitutional horizon.